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Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

January Term, 1991

SHELDON I. WIELAND, JR.

Petitioner,

-vs-

ROBERT BROWN, DIRECTOR,
Michigan Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the multiplicitous information in the instance case violate the Petitioner's right not to be twice placed in jeopardy for the same offense, and substantially prejudice the Petitioner in violation of his right to due process?

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OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On January 13, 1986, the Michigan Court of Appeals affirmed Petitioner's October 17, 1984, jury trial conviction for First Degree Criminal Sexual Conduct and consequent sentence of four to twenty years in an unpublished per curiam opinion (1a). The Michigan Supreme Court denied leave to appeal on June 30, 1986, in an Order published at 425 Mich 876 (1986) (14a).

On March 31, 1988, the United States District Court for the Western District of Michigan, per Judge Richard A. Enslen, rendered a written unpublished opinion and accompanying Judgment denying Petitioner's petition for a writ of habeas corpus submitted pursuant to 28 U.S.C. §2254. (15a).

On November 8, 1990, the United States Court of Appeals for the Sixth Circuit

affirmed the decision of the United States District Court in an unpublished per curiam opinion. (34a).

STATEMENT OF JURISDICTION

Petitioner, Sheldon I. Wieland, Jr., moves this Honorable Court now for a writ of certiorari and review of the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-titled cause on November 8, 1990. (34a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Five.

(Emphasis added)

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment Six.

(Emphasis added)

STATEMENT OF THE CASE

In February, 1984, Petitioner was arrested and charged with six counts of First Degree Criminal Sexual Conduct in violation of Michigan Compiled Laws 750.520b(1)(a) which prohibits sexual penetration with a person under thirteen years of age. These criminal acts allegedly occurred on the following six sets of dates:

I. On or about July 26, 1983;

II. On August 25, 1983;

III. On or about September 5, through September 19, 1983;

IV. On or about September 26, 1983;

V. On or about October 10, 1983; and

VI. On or about October 11, through October 17, 1983.

On February 29, 1984, the 61st District Court of Michigan conducted a

preliminary examination in the matter. At this time, the District Court amended allegation III, "on or about September 5, 1983, through September 19, 1983" to read, "on or about September 6, 1983, through September 19, 1983." The District Court also amended Count IV, "on or about September 26" to read, "on or about September 24, 1983." (preliminary examination transcript, pp. 81-82). Following testimony by the complainant, Petitioner was bound over to Kent County Circuit Court to stand trial on all six allegations.

On April 20, 1984, Petitioner requested of the trial court by way of pretrial motion that the six charges be consolidated for one trial pursuant to state court rules and this request was granted by the trial court. (April 20, 1984, hearing transcript, p. 11).

Petitioner's request for particularity regarding the dates of the alleged acts, specifically the shotgun dates of Counts III and IV in order that Petitioner could respond in terms of investigation and notice of alibi, was denied by the trial court without prejudice.

On May 22, 1984, Petitioner filed a Notice of Alibi specifically regarding Count IV, the "on or about September 24, 1983," allegation. (September 14, 1984, motion hearing transcript, p. 6).

On September 14, 1984, the prosecution responded to Petitioner's Notice of Alibi by motion to again amend Count IV from "on or about September 24, 1983," to "on or about September 16, 1983." The effect of this amendment was the overlapping of Counts III and IV, each Count alleging that Petitioner committed criminal sexual conduct on September 16, 1983. Petitioner

strongly objected to this amendment stating:

> "They have already got that [date] charged under the shotgun, the September shotgun date [Count III], so that in effect what they want to do is subject my client to a shotgun of 'September 6 through 19' and also somehow to have the court change this [Count, Count IV] to an 'on or about September 16th,' which would be covering the identical period of time that we had objected to before [for lack of particularity on April 20, 1984] and in effect have a -- I don't know if it is a double jeopardy argument of a lack of specificity argument or both, but in effect we had objected to this manner and form of charging in the past and tried to comply with it in terms of an alibi, and now that we have constructed the alibi proofs on these different dates, the Prosecutor is moving the target again and moving it into an area that's already covered by a charge." (September 14, 1984, motion hearing transcript, pp. 7-9).

The trial court then granted the prosecutor's motion for the amendment. (September 14, 1984, motion hearing transcript, p. 9)

Trial proceedings commenced on October

8, 1984. During the course of the proceedings, Petitioner denied all six Counts of allegations through his own extensive testimony. (trial transcript, pp. 639-918) Petitioner's testimony was supported by the testimony of thirty-nine other witnesses. Petitioner's witnesses included alibi witnesses, merit witnesses, and character witnesses.

Jury deliberations commenced on October 17, 1984. During the second day of deliberation the jury asked, "since question number four, on or about September 16, falls within the dates of question number three, September 6, through 19, does this not dictate that if guilty on number four, the answer must also be the same on number three?" (trial transcript, p. 1037) The court responded, "the answers to question number three and question number four need not be consistent." (trial

transcript, p. 1037) The court went on to state that the September 16th allegation is a specific date and that the other dates are collective, "so they need not be consistent answers." (trial transcript, pp. 1036-1038). Petitioner then interposed the following objection:

> "MR. DODGE: Your Honor, at a previous time on a Friday morning motion hearing, we objected to the September 24th date being changed to the 16th for a number of reasons. One of the specific objections that was raised at that time, that we obviously would renew at this time, had to do with the double jeopardy aspect of my client, in effect, being in jeopardy of the same date twice, and that if the jury, in effect, could find him guilty twice on the same date or even to consider his guilt or innocence of twice on the same date, being September 16th. We have previously raised that objection. We renew it at this time. We don't believe that the September 16th charge should exist as a separate charge from the other shotgun charge on the 6th through the 19th, all of which has been stated prior to trial."
>
> (trial transcript, pp. 1036-1039).

The trial court then indicated the objection was preserved for the record. (trial transcript, p. 1039)

The jury then returned a verdict of Not Guilty as to Count I, Not Guilty as to Count II, Not Guilty as to Count III, Guilty as to Count IV, Not Guilty as to Count V, and Not Guilty as to Count VI.

On November 9, 1984, Petitioner moved the trial court to set aside the guilty verdict rendered on Count IV of the information claiming that the Petitioner's right to be free from double jeopardy had been violated since the jury found Petitioner not guilty on Count III alleging criminal sexual conduct "on or about September 6th through September 19th, 1983," and inconsistently and over Petitioner's objections found Petitioner guilty on Count IV alleging criminal sexual conduct "on or about September 16, 1983."

The trial court denied Petitioner's motion to set aside the verdict, denied Petitioner's request for the trial court to certify this double jeopardy issue for an interlocutory appeal to the Michigan Court of Appeals, and denied Mr. Wieland's request to be permitted to bail during Appellate proceedings. (November 9, 1984, motion hearing transcript, p. 18)

On November 21, 1984, after acknowledging receipt of seventy letters as a "remarkable" display of support in favor of Petitioner, the trial court sentenced the Petitioner to a term of four to twenty years in prison and also denied Petitioner's request for bail pending appeal.

On appeal to the United States Court of Appeals for the Sixth Circuit, from the Federal District Court's denial of his Petition for a Writ of Habeas Corpus,

Petitioner argued that the trial proceedings violated his Michigan and Federal Constitutional rights not to be twice placed in jeopardy for the same offense and that Petitioner, over numerous objections, was in fact subjected to two trials in a single trial court proceeding because he was twice charged for committing the same alleged criminal sexual conduct on the date of September 16, 1983. Petitioner argued further that the multiplicitous Counts and the information charging Petitioner with the same offense and the same date in two different Counts resulted in substantial prejudice to Petitioner in violation of his right to due process and therefore warranted reversal. The Sixth Circuit declined to find any Constitutional violation, ruling that although the proper course would have been for the trial court to amend Count III to formally omit

September 16, 1983, the jury fully understood any possible ambiguity in the indictment and, as a practical matter, eliminated it to find Petitioner guilty beyond a reasonable doubt on or about September 16 and on no other day. The court held that moreover, Petitioner was not exposed to the real danger of a multiplicitous indictment or information, namely, multiple punishment, in violation of the double jeopardy clause. Finally, the court held that even assuming a Constitutional violation, the remedy is not necessarily retrial. (34a)

REASONS FOR GRANTING THE WRIT

Petitioner submits that the instant case raises an important question of federal law, unique on its facts, which has not been settled by this Court: Does an acquittal on one of two multiplicitous counts followed by a conviction on the

second multiplicitous count in a single trial violate the Double Jeopardy provisions of the United States and Michigan State Constitution as well as violate the Petitioner's right to due process of the law where the Count on which the Petitioner was acquitted alleges the same offense under the same state statute and includes the very same crime or act alleged in the Count for which the jury returned a guilty verdict? And does such a multiplicitous information itself violate the Petitioner's right not to be twice placed in jeopardy for the same offense in a single proceeding or constitute a substantially prejudicial, unfair, and improper charging so as to violate the Petitioner's right to due process of the law? Petitioner notes that the Sixth Circuit United States Court of Appeals has rendered a decision in the instant case in

conflict with other published Federal District Court decisions, i.e., *United States v Marzani*, 71 F Supp 615, 618 (DDC, 1947) and *Harrell v Israel*, 478 F Supp 752 (ED Wisconsin, 1979), which cases would clearly confirm that the Petitioner in the instant case was in fact twice placed in jeopardy of conviction for the same offense. Petitioner submits that the answer to the aforementioned questions is yes, and is one on which this Court should grant certiorari.

As this Honorable Court is well aware, the Fifth Amendment to the United States Constitution provides in part, "no person shall...be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy clause of the Federal Constitution applies to the States via the Fourteenth Amendment. *Benton v Maryland*, 395 U.S. 784; 89 S Ct 2056; 23 L Ed 2d 707

(1969).

The Michigan Constitution of 1963, Article 1, §15, almost identically provides, "no person shall be subject for the same offense to be twice put in jeopardy."

Petitioner respectfully contends that his state court conviction, which was affirmed by the Michigan Court of Appeals as well as the Federal District Court and United States Court of Appeals for the Sixth Circuit, resulted from and included a violation of his right not to be twice placed in jeopardy for the same offense as well as a violation of his right to due process of the law under both the Federal and Michigan Constitutions.

The Sixth Amendment of the United States Constitution provides that an accused has a right to be advised of the nature of the charges against him. As part

and parcel of this right, an accused is entitled to an Information which, with a fair degree of certainty, specifies the particular charge against him and fixes the scope of prosecution. This requirement is essential to the accused's trial preparation and to his double jeopardy protection. *Clausen v Clerk of Circuit Court*, 537 F Supp 1233 (1982). In the case at bar, the trial judge allowed the prosecution to make several amendments to the Information. After these amendments, the Information impermissably charged the petitioner twice for committing the same criminal act and therefore, although the Petitioner was not actually subjected to two trial proceedings, such impermissable charging placed the Petitioner twice in jeopardy for one criminal act in one single proceeding. The Double Jeopardy clause clearly prohibits multiple prosecutions by

the state for the same offense. Whether those multiple prosecutions occur serially, over a number of proceedings, or simultaneously in one proceeding should not be dispositive. The Petitioner submits that the Double Jeopardy clause should be interpreted to prohibit not only multiple convictions or multiple punishments for the same offense but also simultaneous prosecutions for the same offense.

Although the Double Jeopardy clause is clearly and succinctly written, it has generated a great deal of confusion among defense attorneys, prosecutors, and judges and, therefore, has been the subject of extensive debate and litigation. To better understand the Double Jeopardy clause, an analysis should first look to the underlying purposes of the clause and then the application of the clause as derived from case law. In *Green v U.S.*, 355 U.S.

184, 187-188; 2 L Ed 2d 199; 78 S Ct 221 (1957), the Supreme Court stated:

> "The constitutional prohibitation against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurispurdence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Typically, Double Jeopardy cases involve facts where the defendant is convicted of both the substantive crime and the lesser included offense, or where the defendant was convicted and/or acquitted of the crime and the prosecutor attempted to re-prosecute. In these cases, the Courts have little difficulty in determining that the

defendant's Double Jeopardy rights were violated. Analogizing the instant case to these cases, "it would seem apparent that if the State cannot constitutionally obtain two convictions for the same act at two separate trials, it cannot do so at the same trial. Although admittedly there is less expense, anxiety and ordeal when the blows are delivered at once, one can hardly say that one is not punished, hurt or embarrassed," when one is forced to twice run the gauntlet for the same alleged criminal act in a single proceeding. *O'Clair v U.S.*, 470 F 2d 1199, 1203 (CA 1, 1972). Indeed the same policy considerations underlying the Double Jeopardy prohibition would seem to support Petitioner's contention in the instant case that the prosecutor should not be allowed to attempt to assure himself of one conviction by charging the same act and

same offense in two separate counts. It is wrong to try a man for a crime of which he has been found innocent and it is wrong to unnecessarily badger a defendant by charging the same offense and conduct in two different counts.

Petitioner does not dispute that a multi-count Information may be tried in one proceeding. However, the various counts must be clear and each must allege a different offense; the amended information in this case fails in this regard. An allegation of criminal sexual conduct, first degree, "on or about September 6 through September 19" necessarily includes an allegation of "on or about September 16." While the instant issue stems from only one trial, it is clear that Petitioner was "subjected to the hazards of trial and possible conviction more than once for an alleged offense...," and that the

Information as aforestated had the effect of "enhancing the possibility that even though innocent [the Petitioner] may be found guilty." *Green, supra*, pp. 187-188.

Petitioner does not dispute that consistency in the verdict is not required. *U.S. v Dunn*, 284 U.S. 390; 52 S Ct 189; 76 L Ed 356 (1932). However, the verdicts in the instant case go beyond the inconsistency allowed for in *Dunn*. In *U.S. v Woodell*, 285 F 2d 316 (CA 4, 1960), the court stated, in keeping with *Dunn*, that

> "Since [*Dunn*] there has been a complete new line of decisions, all holding that consistency is not required in a jury verdict. Where <u>different</u> offenses are separately charged in the counts of a single Indictment and the same evidence is offered in support of each, an acquittal on one count cannot be pleaded as res judicata of the others." (Emphasis added) (Page 317)

Petitioner submits that the instant case is distinguishable in that the instant case

involves multiple counts in the same information alleging the same offense on the same dates. In *Hughes v United States*, 95 F 2d 538 (CA 5, 1938), a case decided after *Dunn*, the court still held that

> "It may be conceded that if the same offense is charged in two counts of an Indictment or in two Indictments consolidated for trial, acquittal on one Count will bar conviction on the other. But in considering this question, the test of identity is whether the same evidence will support both Counts." (Emphasis added) (Pages 538-539)

Labeled double jeopardy or not, the repugnancy is such that if the jury accepts Petitioner's contention that he did not commit the offense alleged between September 5, 1983, and September 19, 1983, the jury must reject the prosecutor's contention that Petitioner committed the same offense alleged on September 16, 1983. To hold otherwise creates an absurdity in the conviction. The same proofs were

submitted for both of the Counts in question, and submitted to support the same offense. It cannot be said, therefore, that somehow there was a different or stronger factual support for the September 16, 1983, allegation that was part of Count IV than was present for the September 16, 1983, allegation that was included in Count III. The jury could not find sufficient evidence to convict Petitioner of the Count alleging the offense(s) to have occurred between September 5, 1983, and September 19, 1983, and, therefore, it cannot be said that they could properly find sufficient evidence to convict Petitioner of the offense allegedly occurring on September 16, 1983. Moreover, the alleged proofs, viewed in a light most favorable to the prosecutor, pointed toward an offense date of September 17, 1983, and did not support a September 16, 1983, offense date.

Petitioner submits that the "implicit acquittal" reasoning in *Green, supra,* should apply equally as well to the instant case. In *Green*, the court reasoned that the jury, given the choice between finding the defendant guilty of either first or second degree murder and choosing the latter implicitly acquitted the defendant on the charge of first degree murder. Simarily, the Defendant's acquittal of Count III in the instant case should operate as an implicit acquittal of Count IV, since Count III included the activity alleged in Count IV. *Marzani, supra,* is also consistent with this theory.

As stated earlier, most of the caselaw addressing the issue of double jeopardy in the Information or Indictment speak to charging a defendant with greater and lesser included offenses on separate counts. The typical issue is whether a

defendant is twice being charged with the "same" offense. The United States Supreme Court applied the *Blockburger*, infra, test to determine whether the crimes are the "same" offense:

> "[The] test to be applied to determine whether there are two offenses are only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v U.S.*, 284 U.S. 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

In other words, if each statutory offense charged requires proof of an additional fact which the other does not require, then the offenses are not the same under the *Blockburger* test. By analogy, in the case at bar, Count III requires no additional proof of fact beyond what Count IV requires. Proving a criminal sexual conduct offense "On or about September 16" would necessarily and logically prove a CSC offense "On or about September 6 through

September 19." Thus, Petitioner respectfully submits that Counts III and IV both alleged the same offense under the *Blockburger* test.

Petitioner also believes that the *Vitale* test applies to the instant case. In *Illinois v Vitale*, 447 U.S. 410; 100 S Ct 2260; 65 L Ed 2d 228 (1980), the Supreme Court focused upon the actual evidence that the prosecution would rely upon to prove the two charged offenses and held that if the evidence used for one charge would be the same evidence used for other charge, then double jeopardy rights are violated even though the two offenses are not the "same" offense under the *Blockburger* test. The *Vitale* test was recently applied in a New Jersey case in which the defendant was acquitted of a "death by automobile" charge and later charged with a "driving under the influence" charge that arose from the same

incident. The Court said:

> "Proof of the recklessness element of death by auto does not involve evidence of driving while under the influence of intoxicating liquor..."

and therefore *Blockburger* does not apply, but:

> "Since the evidence to be presented in the drunk driving prosecution of this defendant would involve the same proofs that were presented to establish the prior offense of death by auto, defendant has a 'substantial' double jeopardy claim under *Vitale*." *New Jersey v DeLunca*, #A-5751-8475, New Jersey Supreme Court, Appellate Division, decided March 14, 1986.

Vitale applies to the Petitioner's case in that the prosecution used exactly the same set of proofs to obtain the conviction under Count IV as the acquitted Count, Count III. Petitioner respectfully contends that to twice use the same evidence at trial, where Petitioner was both acquitted and convicted for committing an alleged offense violated his constitutional right to be free from double

jeopardy.

Petitioner submits that it is clear that he was charged with the same offense in more than one count. The District Court Judge, in his March 31, 1988, written Opinion, confirmed this when he wrote:

> "There is clearly something 'wrong' with charging a defendant with the same offense in more than one count." 'Multiplicity' is the charging of a single offense in separate counts." U.S. Hairrell, [sic] 521 F 2d 1264 (6th Cir.), cert denied, 423 U.S. 1035 (1975). "That is what occurred here." (Page 5) (25a)

The test for double jeopardy as applied to multiplicity was set forth in *U.S. v Marzani*, 71 F Supp 615, 618 (1947); affirmed 168 F 2d 133; affirmed 335 U.S. 895, 69 S Ct 299, 93 L Ed 431; affirmed on rehearing 336 U.S. 922, 69 S Ct 653, 93 L Ed 1084, "The test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal

on another count would bring about a contradiction on the face of the verdict." *Harrel v Israel*, 478 F Supp 752 (1979), a case in which the defendant was charged and convicted of two counts of rape for twice raping the victim in a twenty-five minute period, applied the *Marzani* test at p. 755:

> "Applying this test, the Court finds that there would be no contradictions on the face of the verdict if the jury found the petitioner guilty of one count and not the other."

In *Harrel*, the Court determined that the defendant committed two separate acts of rape and therefore the Information was not multiplicitous. If the Court had determined that there was only one act of rape, or one continuous rape for twenty-five minutes, the Information would have been improper.

Petitioner submits that the circumstances in the instant case are in

fact ripe for application of the double jeopardy clause. To say that double jeopardy is inapplicable to the instant multiplicitous Information ignores logic, common sense, and the peculiar pretrial and trial objections to the proceedings raised by Petitioner. Petitioner submits that the better test to be used in the instant case is indeed the test set forth in *U.S. v Marzani, supra*, and applied in *Harrel v Israel, supra*. Moreover, Petitioner submits that more recent cases have recognized that a defendant is subjected to multiple prosecutions in violation of the double jeopardy clause when a single offense is charged in several counts. *U.S. v Rosenthal*, 793 F 2d 1214, 1234 (CA 11, 1986). In the instant case, it would be possible or proper for the jury to find Petitioner guilty on Count IV and not Count III, but not the reverse. Acquittal on

Count III in the instant case necessarily includes an acquittal on Count IV.

Additionally, the order in which the jury returned the verdicts on the respective Counts supports Petitioner's contention that he was tried "successively" for the same offense twice. Petitioner was found not guilty first on Count III and, thus, the impanelment and swearing of the jury had concluded favorably to Petitioner. Therefore, when the jury returned a verdict of guilty on Count IV, it had found him guilty of the same offense for which it had just acquitted him.

Petitioner submits that *Marzani* applies to the case at bar, and that the forbidden result of the *Marzani* test actually occurred. Under *Marzani*, the multiplicitous information and resultant conviction violated the Petitioner's Constitutional right to be free from double

jeopardy. The overlap in dates between Counts III and IV amounts to more than an appearance, as the Sixth Circuit would label it, of an opportunity for the jury to convict twice for a crime committed on or about September 16. It is in fact a second opportunity, a second jeopardy, and Petitioner submits that this Honorable Court should interpret it as such. Discussing the protection of the double jeopardy provision, this Honorable Court in *Green v U.S., supra*, stated that "[if] such great Constitutional protections are given a narrow, grudging application they are deprived of much of their significance." 355 U.S. 198.

Although there are many double jeopardy cases dealing with greater and lesser included offenses, there are very few pertinent multiplicity of Information cases. Multiplicity is the charging of a

single offense in several counts. *U.S. v Free*, 574 F 2d 1221 (CA 5, 1978). As already demonstrated, a multiplicitous Information violates the spirit of the double jeopardy clause in that it would allow for prosecutions that are prohibited by the *Blockburger* and *Vitale* cases.

In U.S. v Hearod, 499 F 2d 1003 (CA 5, 1974), the Court stated that one of the hazards raised by a multiplicitous indictment is:

> "That the repeated assertion of the details of a singular course of conduct and multiple counts will prejudice the defendant and confuse the jury by suggesting that not one but several crimes have been committed." (Page 1005).

The Court in *Hearod*, however, held that because the two counts in which *Hearod* was charged contained simple and direct averments that his assault upon the alleged victim violated two separate statutes, there was no threat of generating an

adverse psychological effect on the jury and, thus, no prejudice.

The adverse effect on the jury in the instant case is not so easily dispensed with where all counts charged the same conduct under the same statute and two counts charged the same conduct under the same statute on the same dates, and Petitioner was found guilty on only one count, a multiplicitous count. In the instant case, it must naturally be said that the jury's deliberations as to all counts were tainted and prejudiced by the multiplicity. Surely the appearance that Petitioner committed more than one violation increased the probability of conviction. The shotgun charge in Count III, together with the other Counts, had the effect of convincing the jury that Petitioner undoubtedly committed the offense at sometime within the allged time

frames given, so that the question became simply a matter of when the offense occurred. Not only did the multiplicitous information improperly place the Petitioner in a position of having to defend himself twice for the same offense, it also led the jury in the instant case to quite possibly conclude that Petitioner was a "bad person" or that since he was twice charged with committing the offense on September 16, 1983, he must be guilty of something.

Petitioner's fears that the jury would be confused by the multiplicitous Information to the disadvantage of Petitioner were in fact confirmed near the conclusion of the trial. There is no question that the jury was, in fact, confused by the multiplicitous Information that was allowed to survive throughout the trial. By the time the trial court allegedly "clarified" the confusion, the

jury had already been allowed to sit, hear, and deliberate in light of the shotgun and multiplicitous Counts. The Court's instructions to the jury only suggested to the jury that a viable alternative would be to find not guilty on one count and guilty on the other, a trade-off, so to speak -- hardly a cure to the already fatal prejudice.

Therefore, even assuming that the double jeopardy clause does not apply in the instant case, Petitioner submits that the multiplicitous Information in the instant case substantially prejudiced the Petitioner and thereby deprived him of his right to due process of the law. Petitioner notes that the Michigan Court of Appeals, in its Opinion affirming Defendant's conviction, noted that Petitioner's

> "real concern here is not double jeopardy, as he labels his claim, but rather whether there is a denial of due process arising out of a vague charge which prevented Defendant from adequately preparing his defense and confused the jury." (4a)

Contrary to what the Michigan Court of Appeals found, Petitioner submits that the multiplicitous Information did operate to prejudice the Defendant to an extent warranting reversal. While typically, at the trial stage, election of counts by the prosecution or appropriate instruction to the jury are possible remedies, *U.S. v Ketchum*, 320 F 2d 3, 8 (CA 2, 1963), cert denied, 375 U.S. 905; 84 S Ct 194; 11 L Ed 2d 145 (1963), the trial court in the instant case failed to adequately apply either remedy, resulting in the Petitioner's conviction on Count IV. The prejudice, Petitioner submits, is all the more underscored in light of the

Petitioner's acquittal on all other Counts.

Petitioner presented a strong defense to the charges leveled against him at trial and successfully defended all but a single charge. The lone conviction can be directly linked to the improper multiplicitous Information that produced a "trade-off" verdict. The Information in the instant case unduly forced Petitioner to twice run the gauntlet on a specific charge for the same offense, which thereby enhanced the possibility that even though innocent, Petitioner would be convicted. Petitioner repeatedly requested that the charges against him be more specifically defined and strenuously objected to the amendments made to the Information. Left to stand, the multiplicitous Information constituted a violation of Petitioner's Constitutional right to be free from double jeopardy, and, acquittal on the one Count,

therefore, should bar conviction on the other. Clearly the multiplicitous Information, as it was allowed to stand in the instant case, contributed to Petitioner's conviction and was contrary to both the letter and spirit of the Fifth Amendment. Even absent a double jeopardy claim, it is clear that the prejudice resulting from the multiplicitous Information was substantial. The possibility for the jury to feel compelled to convict on at least one Count because of the number of Counts stressing or including the September 16, 1983, date cannot be undermined.

Petitioner respectfully contends that the simultaneous prosecution in Count III and Count IV for the same offense requires the conviction in Count IV to be set aside and this lone conviction reversed. Petitioner submits that this is the only

remedy available in the instant case to cure the prejudice occurring at trial the absence of which may have resulted in a verdict of not guilty on all Counts. Moreover, the U.S. Constitution forbids a "second jeopardy" and not merely multiple convictions or sentences resulting from that jeopardy.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court, grant certiorari and issue a definitive pronouncement on the propriety of the multiplicitous Information in the instant case in order to resolve any conflicting opinions between the Federal Courts as well as to clarify an issue of jurisprudentail significance. Petitioner respectfully prays that this Court grant plenary review, reverse the decision of the United States Court of Appeals for the Sixth Circuit, hold that the use of the

multiplicitous Information at trial in the instant case was violative of the Petitioner's Fifth Amendment protection against double jeopardy as well as his right to due process of the law, and remand for proceedings consistent with this Court's opinion.

February 1, 1991 Respectfully submitted,

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STATE OF MICHIGAN
COURT OF APPEALS

Jan. 13, 1986

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, No. 81739

v

SHELDON IRWIN WIELAND, JR.

Defendant-Appellant.

BEFORE: M.H. Wahls, P.J., G.S. Allen, Jr. and J.C. Ravitz*, JJ.

PER CURIAM

Defendant was jury-convicted of first degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (sexual penetration with a person under 13 years of age). Sentenced to a prison term of four to 20 years, defendant appeals as of right. We affirm.

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*Recorder's Court Judge sitting on the Court of Appeals by assignment.

Defendant's conviction came on count IV which charged defendant with CSC-1 occurring on or about September 16, 1983. Counts I-III, V and VI, as to which defendant was acquitted, charged defendant with CSC-1 respectively on or about July 26, 1983, August 25, 1983, September 6 through September 19, 1983, October 10, 1983, and October 11 through October 17, 1983. It may be noted that the date of September 16, 1983, charged in count IV is included within the dates of September 6 through 19 1983, charged in count III. As nis first question on appeal, defendant asks whether this overlap in charges did not violate his right to be free of double jeopardy.

The reason for the overlap between the two charges is readily explained.

During the period of September 6 through 19, 1983, the complainant babysat for defendant on several occasions and allegedly engaged in intercourse with defendant on each occasion. Also about that time, defendant engaged in intercourse with the complainant in a non-babysitting situation where another girl was present and observed the criminal sexual conduct. The people initially charged this latter incident as occurring on September 26, 1983, but, as more evidence became available, the charge was amended to read September 24 and, finally, September 16. The people offered to also amend count III to expressly exclude the September 16 date, but defendant did not respond to the offer and the amendment was not made. During deliberations, the jury expressly

asked for clarification of the relationship between counts III and IV, and any confusion about the charges was cleared up at that time.

On these facts, defendant was not subject to multiple prosecutions, convictions or punishments for the same offense. Hence, we find no violation of the quaranty against double joepardy. See North Carolina v Pearce, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). Defendant's real concern here is not double jeopardy, as he labels his claim, but rather whether there is a denial of due process arising out of a vague charge which prevented defendant from adequately preparing his defense and confused the jury. We are convinced defendant received a fair trial on the charges, that he knew what complained-of

conduct he needed to defend against, and that the jury was neither coerced by the multiple counts nor confused.

Defendant also argues that the trial court erred in permitting certain testimony of the doctor who examined the complainant several months after the charged incidents allegedly occurred. The doctor testified that complainant's vagina was more open than average for a female of her age and that such a finding was compatible with sexual activity. In his opinion, complainant was sexually active, but he acknowledged on cross-examination that his findings told him nothing about the age or identity of the person or persons with whom the complainant had intercourse. Defendant characterizes the doctor's testimony as minimally probative because defendant did

not dispute that the complainant was sexually active and not a virgin. Defendant argues that the testimony was extremely prejudicial and should have been excluded pursuant to MRE 403.

However, defendant does not convince us that he suffered any undue prejudice because of the testimony. Defendant first argues that the jury was misled concerning the testimony's minimal probative purpose. This argument is devoid of merit as the doctor's testimony was the prosecutor's only medical evidence of penetration, an element of the crime which the prosecutor had to prove beyond a reasonable doubt. People v McGillen #2, 392 Mich 278, 284-285; 220 NW2d 689 (1974). Defendant next argues that the testimony was unfairly admitted because he was prohibited by the "rape

shield" statute, MCL 750.520j; MSA 28.788(10), from presenting complete testimony concerning complainant's prior sexual history which may have accounted for the doctor's observations. This argument is also without merit. In People v Mikula, 84 Mich App 108, 114; 269 NW2d 195 (1978) this Court stated the well-settled rule that "where the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to show that another person might have been responsible for her condition." In this case, defendant has not made any offer of proof to account for the doctor's observations so we find no basis for reversal.

Defendant also assigns error to various comments by the prosecutor in rebuttal argument. Defendant challenges the prosecutor's characterization of him as a "child-man", of his sending cards to the complainant as "atypical, I think, of an adult", and of his relationship with the complainant as "basically an affair between two 12 year olds, one of which is really 12 and one of who functions on the level of a 12 year old child". We believe these comments were proper argument. The prosecutor, as an advocate, ~~is free~~ to relate the facts in evidence to her theory of the case and to argue the evidence and all reasonable inferences therefrom. People v Jansson, 116 Mich App 674; 323 NW2d 508 (1982).

We are more troubled, though, by a fourth challenged comment by the prosecutor which occurred as follows:

"MS. CROZIER: Finally, Mr. Dodge tells you you will hear an instruction saying good character alone is enough for you to acquit the Defendant.

"I submit to you that this is a crime of opportunity, this is a crime of secrecy, and nobody who was going to be his character witness is going to have known what happened.

"All of you have known of people, have read of people who are of outstanding character and then it came to the forefront that they had engaged in sexual behavior with a child.

"The Press reported in 1982 that --

"MR. DODGE: (Interposing) Your Honor, I would object to this specifically.

"MS. CROZIER: Your Honor, this is closing.

"THE COURT: She hasn't even said anything yet. How can you object to something she hasn't said?

"MR. DODGE: Apparently, she is going to talk about Press articles about people who have had -- either there are some claims regarding sexual improprieties and whatnot. How does that relate to anything in this case?

"THE COURT: You may proceed.

"MS. CROZIER: Thank you, Your Honor.

"The Press reported in 1982 that a Mecosta County teacher was convicted of molesting two girls.

"MR. DODGE: Your Honor, I object to that. How in the world does that come into this case?

"MS. CROZIER: Your Honor, he has argued that because of his good character, because of the fact that he

has character witnesses -- I think I have a right to point out that there are individuals out there who have wonderful character who have been guilty of this type of crime.

"THE COURT: This has been a difficult case. Let's confine ourselves to this case and not some other case.

"MS. CROZIER: Ladies and gentlemen, all of you know that character is something that one has by reputation, and when you engage in behavior that is perverted, that is amoral, that is illegal, you don't share that with anyone else. It's something that's kept a secret, that is hidden and that none of those people would have known about or have any way of knowing about, would have no opportunity to know about."

The prosecutor's remark about the 1982

press report was not a comment on facts in evidence and was error. People v Wise, 134 Mich App 82; 351 NW2d 255 (1984), lv den 422 Mich 852 (1985). On defense counsel's second attempt, the court did sustain the objection; counsel did not request a curative instruction or a mistrial so we assume he was satisfied that untoward damage had not been done. Accordingly, our review is for manifest injustice.

The comment on the Mecosta teacher case was part of a proper argument in response to a matter first raised by defense counsel. The prosecutor could properly argue the shortcomings of character and reputation evidence. In this context, we do not believe that the prosecutor's error in bringing in facts not of record was done in reckless or

intentional disregard of defendant's rights. Further, the prosecutor was not given the opportunity to get into the specific facts of the unrelated case, and it does not appear that the jury was familiar with it. We do not find any reason to call into doubt the jury's verdict. Contrast People v Kelley, 142 Mich App 671; ____ NW2d ____ (1985).

Defendant's last issue addresses a possible situation arising on retrial. Because we affirm his conviction, we need not address the issue.

Affirmed.

/s/ Myron H. Wahls
/s/ Glenn S. Allen, Jr.
/s/ Justin C. Ravitz

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 30th day of June in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

78105

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 78015
COA: 81739
LC: 84-34465-FC

SHELDON IRWIN WIELAND, JR.,

Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

SHELDON I WIELAND, JR.,

Petitioner,

vs File No. K86-282 CA4

ROBERT BROWN, Director of the Michigan Department of Corrections,

Respondent.

OPINION

The petitioner in this case filed a petition for writ of habeas corpus on July 9, 1986. Magistrate Rowland filed a Report and Recommendation on September 2, 1987 in which he recommended that the Court deny petitioner's petition. See 28 U.S.C. §636(b)(1)(B). Petitioner filed his objections to the Magistrate's Report on September 14, 1987. Having reviewed the record and petitioner's claims de novo, I believe that the Magistrate

correctly analyzed and decided the issues presented.

I write here to clarify that portion of the Magistrate's opinion concerning the Court's understanding of the relationship between "multiplicity" and double jeopardy. The Magistrate noted that some courts have held that multiplicity, that is, the charging of a single offense throughout several counts or in several charging instruments, violates the double jeopardy clause. See e.g., United States v Rosenthal, 793 F.2d 1214, 1234 (11th Cir. 1986), cert. denied 107 S. Ct. 1377 (1986). The Magistrate concluded that double jeopardy is inapplicable to multiple counts under a single information.

Petitioner in his objections argues that the Magistrate's conclusion that the

double jeopardy clause is inapplicable to multiple counts under a single information "ignores logic, common sense, and the peculiar pretrial and trial objections to the proceedings by Petitioner in this case." Petitioner asserts that while "the Double Jeopardy clause obviously also applies to successive Prosecutions and separate trials, the lack of specific precedent on point dealing with multiple counts in the same Information alleging the same offense on the same dates presents this case as a case of first impression with this particular issue." Petitioner argues that "the lack of precedent and lack of any prior case where the Prosecutor has subjected a defendant to the same charge being tried in two separate counts with the defendant being

acquitted in the earlier count sequentially should not be the basis for denial of relief in this matter." Petitioner's Memorandum of Objections at 3-4.

It is true that courts have held that "dismissal during trial of one count of a multiple count indictment has no double jeopardy implications with respect to the remaining counts." Cf. United States v McDaniel, 538 F.2d 408, 414 (D.C. Cir. 1976). Courts following this line of analysis make clear that the double jeopardy clause is not generally applicable to multiple counts under the same indictment, but rather the clause refers to successive prosecutions in separate trials, Id.

However, some courts have suggested that a multiple-count indictment may

violate the double jeopardy clause if the Government charges a single offense in more than one count. See United States v. Marzani, 71 F. Supp. 625, 618 (D.C. 1947); affirmed, 168 F.2d 133 (D.C. Cir. 1948); affirmed, 335 U.S. 895 (1948). Marzani held that "the test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict." Id. In almost forty years,, the only reported federal decision applying the Marzani test did so to determine "whether an offense is continuous or not." Harrell v. Israel, 478 F. supp 752, 755 (E.D. Wis. 1979).

In Harrell, the defendant was charged and convicted of two counts of rape for twice raping the victim in a twenty-five

minute period. The Harrell court applied the Marzani test and concluded that "there would be no contradictions on the face of the verdict if the jury found the petitioner guilty of one count and not the other." Harrell, 478 F. Supp. at 755. The Harrell court emphasized that the defendant committed two separate acts of rape. The petitioner, sub judicie, argues that had the Harrell court determined that there was only one act of rape, the information would have been improper.

The Court notes that it is well settled that the double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution after conviction, and against multiple punishments for the same

offense. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969). However, the history of judicial interpretation of the double jeopardy clause has been one marked by radical breaks and constant revision. One commentator has noted that "[t]he history of judicial attempts to fashion a workable definition of the concept of 'same offense' has been tortuous." Thomas, Rico Prosecutions and the Double Jeopardy/Multiple Punishment Problem, 78 Nw.U.L. Rev. 1359, 1363 (1984) (noting that the prohibition against multiplicious counts is based in part on the theory that charging the same conduct in multiple counts is prejudicial to the defendant on the issue of guilt or innocence and distinguishing this concern from that of multiple punishment. Thomas also suggests that different values are

protected by the two doctrines and after noting five definitions of "same offense" -- none of which is applicable here -- he suggests that perhaps a sixth definition of "same offense" is necessary.) It is that suggested sixth definition of the "same offense" which appears to embrace the identical issue which petitioner is raising here. Interestingly, to the Court's knowledge, the Marzani double jeopardy test has not been cited by any commentator.

It has also been suggested that recent Supreme Court decisions which have decided the same offense issue have broadened the protection of the double jeopardy clause when offenses are prosecuted separately and narrowed the protection when offenses are prosecuted

in the same trial. Id. See also Thomas, A Unified Theory of Multiple Punishment, 47 U. Pitt. L. Rev. 1 (1985).

Assuming that the Marzani double jeopardy test, decided in 1947, is still good law and is applicable here -- a proposition which is anything but clear to this Court -- it still appears that the double jeopardy danger which is most at play when the same offense is charged twice is that of double punishment. It is clear that double punishment is not at issue here as defendant was found guilty on Count IV and not guilty on Count III. But defendant protests: "Yes, but I was first found not guilty as to Count III, that is, I was acquitted on Count III. Count III charged me with criminal sexual conduct on or about September 6, 1983 through September 19, 1983. Immediately

thereafter, the jury found me guilty on Count IV of the same offense -- Criminal Sexual Conduct -- on September 16, 1983. Under the Marzani test there is obviously a contradiction on the face of the verdict. Therefore, there has been a double jeopardy violation."

It is clear that defendant's argument, and perhaps the rationale of Marzani itself set forth the hypothetical "response" above, rests upon the untenable legal fiction that there has been a simultaneous "successive" prosecution. It is this oxymoron that calls into question the theoretical underpinnings of the Marzani test. This observation, of course, does not end our analysis. There is clearly something "wrong" with charging a defendant with the same offense in more than one count.

"'Multiplicity' is the charging of a single offense in separate counts." U.S. Hairrell, 521 F.2d 1264, 1266 (6th Cir.), cert. denied, 423 U.S. 1035 (1975). That is what occurred here. But multiplicity like its close cousin, "duplicity," ("the joining in a single count of two or more distinct and separate offense. . ." U.S. v. Starks, 515 F.2d 112, 116 (3d Cir. 1975) does not necessarily require dismissal of an indictment. The defendant may ask the government to elect the count on which proof will be presented. U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952).

Here, the petitioner did indeed object both pretrial and at trial during the jury deliberations. Respondent argues, however, that any confusion which resulted from the court's resolution of

the jury's question was resolved in petitioner's favor in that petitioner was acquitted of the sexual criminal conduct charged on or about September 6th through September 19th (Count IV). Respondent suggests that it is clear from the "interchange" that took place between the jury foreman and the trial court that the jury indicated that it felt that the petitioner had engaged in an act of sexual intercourse with the victim on September 16, 1983. Moreover, respondent argues that the prosecutor twice offered to amend Count IV so as to exclude the charge arising on September 16, 1983. The prosecutor suggests that the petitioner "sandbagged" on those requests because the petitioner really wanted to have the September 16th charge dismissed.

The Court finds it inexplicable that a formal amendment of Count IV was not made under these circumstances. Such an amendment, early on, would have avoided the tangled arguments with which this court is now presented. It is not clear to the Court why the trial court judge did not order the prosecution to make an election between Count III or Count IV or to order the prosecutor to amend Count III as the prosecutor proposed -- so that the same date would not be included in both counts. Petitioner-defendant did present the argument that the overlapping of dates in the two counts was either a double jeopardy problem or a problem of "lack of specificity". Perhaps the trial court reasoned that the petitioner-defendant never made a formal motion. The Court simply rejects, however, any

suggestion that petitioner-defendant somehow "waived" his double jeopardy argument. (See Tr. at 5-10; attached as Ex. A to Petitioner's Objection to Magistrate's Report dated September 1, 1987).

Nevertheless, the Court concludes that the multiplicity problem was actually cured by the interchange which took place between the jury [foreman] and the judge. See Magistrate Rowland's Report and Recommendation at 5-6. The Court believes that the trial court judge actually granted the functional equivalent of a dismissal -- or perhaps, more accurately, a directed verdict -- as to Count III. That appears to be all petitioner was really entitled to given the multiplicity problem which existed. That analysis, however, does not complete

our inquiry. The problem of possible prejudice remains. This Court has previously noted the well known dangers of multiplicity.

> The vice of multiplicity is that it may lead to multiple sentences for the same offense, though for this there are remedies, and that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes."

1 Wright Federal Practice and Prosedure: Criminal 2d, §142, pp. 475-476 cited in United States v. Austin, 99 F.R.D. 292 (W.D. Mich. 1983).

And to the point, the petitioner argues that in the case sub judicie he was prejudiced because the government charged the "same offense" in two counts. Moreover, petitioner suggests that the alleged prejudice is pronounced

here because petitioner was found not guilty on all counts except Count IV: the alleged sexual penetration which occurred on September 16, 1983.

This Court agrees with the Michigan Court of Appeals' (as well as with the Magistrate's analysis) that petitioner's multiplicity problem is more accurately characterized as a claim of a denial of due process insofar as the jury may have been coerced, confused, or otherwise prejudiced by the multiple counts placed before it. In any event, it is beyond argument that the trial court's clarification assured the petitioner that he would not receive multiple punishments for the single offense which the jury found was committed on September 16, 1983.

Moreover, a review of the facts supports the Magistrate's conclusion that there was more than ample evidence to support the jury verdict and any possible prejudice which may have resulted from hearing multiple overlapping dates was negligible. The jury was able to observe the victim's demeanor as she testified in detail about the events that occurred on September 16, 1983. Similarly, the jury was able to observe the demeanor of the petitioner-defendant as he testified about his actions on that same date. Further, the victim's testimony was corroborated by her friend who was present at the time and saw petitioner and the victim kissing and saw petitioner lying on top of the victim. (T.T. at 295). Moreover, the date of September 16, 1983 -- as set forth in Count IV --

was verified by a long distance phone bill. (T.T. at 273. See Magistrate's Report and Recommendation at 6-7.

The Court concludes that petitioner has failed to make a sufficient showing of prejudice to warrant habeas relief whether his claim is characterized as a "double jeopardy claim" or a denial of due process claim. Accordingly, the court will adopt the Magistrate's recommendation and will enter an order denying petitioner's petition.

DATED in Kalamazoo, MI:
3/31/88

/s/ RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SHELDON I. WIELAND, JR.,

Petitioner,

v File No. K86-282 CA4

ROBERT BROWN, Director of the Michigan Department of Corrections,

Respondent.

JUDGMENT

In accordance with the opinion dated March 31, 1988;

IT IS HEREBY ORDERED that Magistrate Rowland's Report and Recommendation dated September 2, 1987 is ADOPTED, as modified, as the opinion of the Court;

IT IS FURTHER ORDERED that petitioner's petition for writ of habeas corpus DENIED.

DATED in Kalamazo, MI:
3/31/88

/s/ RICHARD A. ENSLEN
U.S. District Judge

NO. 89-2213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELDON I. WIELAND, JR.,

Petitioner-Appellant,

v.

ROBERT BROWN, Director,
Michigan Department of
Corrections,

Respondent-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Decided and Filed _____

Before: WELLFORD and NELSON, Circuit Judges; and MEREDITH, District Judge.

PER CURIAM: Defendant, Sheldon Wieland, Jr., appeals his denial of habeas corpus following conviction for first degree criminal sexual conduct in Michigan state court proceedings. The

issues presented are: whether Wieland filed a timely notice of appeal and, if so, whether Wieland was subjected to double jeopardy or denied due process of law in respect to overlapping dates in separate counts of the state indictment. We affirm.

At 34 years of age Wieland, a school teacher, was charged with six counts of criminal sexual conduct, first degree, with 12-year-old Debbi Hockman, in February 1984. Mich. Comp. Laws §750.520b(1)(1). The sexual acts allegedly took place at the following times:

> Count I. On or about July 26, 1983.
>
> Count II. On August 25, 1983.
>
> Count III. On or about September 5 through September 19, 1983 (ultimately amended to September 6 through September 19, 1983).
>
> Count IV. On or about September 26, 1983 (ultimately amended to September 16, 1983).

Count V. On or about October 10, 1983.

Count VI. On or about October 11, through October 17, 1983.

When Wieland was bound over for trial on these six charges the third count was amended to read "On or about September 6, 1983, through September 19, 1983," and the fourth count was amended to read "On or about September 24, 1983." There was no apparent overlap in dates on the face of the indictment at this juncture.

Prior to trial Debbi Hockman's mother discovered a telephone bill which indicated that Count IV was incorrect in its date. This phone bill indicated that Mrs. Hockman had called long distance to her daughter on September 16, 1983 which coincided with Debbi's refreshed recollection that one act of intercourse with Wieland had occurred while her

parents were out of town on that night. After this discovery, the prosecution filed a pretrial motion to amend count IV to reflect the September 16 date. Wieland objected to this amendment raising the issue of overlap in counts III and IV since September 16 falls within September 6 through September 19 (the amended dates of the Count III), and noted that an alibi defense had already been prepared and offered for the September 24 date.

The prosecution suggested amendment of count III to eliminate the 16th date, and Wieland maintained then that he was being subjected to double jeopardy. The amendment to count IV was allowed but count III was not amended. Somehow the trial court overlooked the apparent overlap after this change.

At trial Debbi Hockman testified about her babysitting for Wieland three to four times a week. She testified that he began making sexual advances that eventually resulted in intercourse. The allegations of sexual misconduct on the night of September 16 were corroborated to a greater degree than the other dates. On that evening Debbi and a friend stayed the night at Wieland's house because the Hockmans were out of town. The friend, Mary Priest, testified that she awoke during the night to find Wieland and Debbi Hockman "lying down and kissing," and revealed further details of her observations early on the morning of September 17.

During the second day of jury deliberation after the trial the

following exchange took place between the judge and the jury foreman:

COURT: Mr. Foreman, would you rise, please? We have a question from you stating: "Since question number four, on or about September 16, falls within the dates of the question number three, September 6 through 19, does this now dictate that if guilty on number four, the answer must also be the same on number three?"

The answers to question number three and question number four need not be consistent.

Does that answer your question, Mr. Foreman?

FOREMAN: I don't believe it fully answers the question, Your Honor. Since the 16th does fall within the scope of the 6th through the 19th, the question was if it was guilty on the 16th, then it must also have been guilty somewhere between the 6th and the 19th, because it does fall on the same question.

COURT: No, because the 16th is a specific date and the other dates are collective, so they need not be consistent answers.

FOREMAN: Okay. Then I have a question then. May I ask it?

COURT: Sure.

FOREMAN: Okay. Then one could say not guilty with the exception of the 16th, which does fall in there, but we don't have a slot like that.

COURT: Then just put down not guilty.

FOREMAN: Very good. Thank you, Your Honor.

Wieland then raised his objection to the existence of the two charges stating that he was in danger of facing double jeopardy. The prosecution again offered to exclude September 16 from count III, but the court ordered no such amendment. The jury returned a verdict of not guilty on all counts except as to Count IV. The trial court sustained the jury verdict and sentenced Wieland on this count.

The Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court denied further appeal. Wieland then pursued a writ of habeas

corpus to the federal courts. The district court denied the petition, finding that a potential for multiplicity in the overlap between counts III and IV but that this problem was cured by the exchange between foreman and court.

Wieland requested a certificate of probable cause pursuant to Federal Rule of Appellate Procedure 22(b). The district court granted the request on April 14, 1988. No further action was taken for nearly a year. On March 21, 1989, Wieland filed a motion to enlarge appeal time, on the basis that he never received the district court's order granting the certificate of probable cause. (Neither had prosecution nor the appeals court clerk received the order). This motion was denied in an opinion and order entered May 15, 1989. Wieland

moved for reconsideration which motion was also denied by the district court on October 2, 1989, and this appeal ensued.

1. Timeliness of notice of appeal

Nearly one year passed between the district court's denial of habeas relief (March 31, 1988) and Wieland's original motion to enlarge the appeal period (March 21, 1989). Wieland had requested a certificate of probable cause prior to appeal on April 8, 1988 since that issue had not been resolved in the March 31, 1988 order. The certificate was granted on April 14, 1988, but Wieland did not file notice of appeal until October 10, 1989, over one year and a half later. Because he did not receive a copy of the certificate of probable cause until March 1989 Wieland claims that he should be

allowed to bring this appeal (Wieland finaly telephoned to request the status of the matter during the week of March 6, 1989 when he learned for the first time that the certificate had long since been issued).

28 U.S.C. §2107 requires a notice of appeal to be filed within thirty days of the entry of judgment. It also provides that the "district court may exend the time for appeal not exceeding thirty days from the expiration of the original time ... prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree" (emphasis added). Federal Rule of Appellate Procedure 4(a) places a similar thirty day time limit on filing a notice of appeal and limits the extension a

district court may grant to thirty days past the prescribed time or ten days from the date of order granting an extension, whichever is later, if the motion for extension is made within the original thirty day period.[1] In addition Rule 26(b), while allowing enlargement of times prescried by some of the rules, specifically prohibits enlargement of the time for filing a notice of appeal.

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[1] Rule 4(a)(5) reads: "The district court upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of [the 30 day period initially granted after entry of judgment or order for filing an appeal] . . . No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion [for extension] whichever occurs later.

Filing of a notice of appeal is "mandatory and jurisdictional." United States v. Robinson, 361 U.S. 220, 224 (1958).

Wieland argues that he was forced to wait because the "course of appeal proceedings [is] affected by whether or not [the court] issue[s] a certificate of probable cause." There is no specific rule, however, precluding the filing of a notice of appeal prior to receipt of the certificate of probable cause as noted by the distict court, although it may later be subject to challenge. The certificate of probable cause is merely an independent prerequisite to proceeding with the appeal. Fitzsimmons v. Yeager, 391 F.2d 849, 854 (3rd Cit. 1968), cert. denied 393 U.S. 868 (1968).

Thus there is a serious question of jurisdiction here. In his memorandum for reconsideration of the order denying his motion to enlarge the time for appeal Wieland argues that he in fact initially complied with the applicable rules by filing a motion for a certificate of probable cause. In support of this contention he cites McMillan v. Barksdale, 823 F.2d 981 (6th Cir. 1987). In that case the district court accepted a prisoner's pro se motion for a certificate of probable cause as a notice of appeal although the formal notice of appeal was not filed until three months after the order appealed from had been entered. McMillan looked to the purpose of the rules and found that the request for the certificate of probable cause showed intent to appeal and since it had

been filed within the thirty day limit was sufficient under the circumstances to satisfy the rules.

> Although rule 3(c) does suggest a form to be followed, there is no magic document called a Notice of Appeal. Any document that meets the requirements of Rule 3(c) and is filed within the time prescribed by Rule 4(a) can function as a notice of appeal.

Id. at 983.

Despite McMillan, the district court felt the present case to be distinguishable because Wieland was represented by counsel, he was not a prisoner at the time, and the delay at issue here was much longer than in McMillan. We believe that the McMillan holding is probably limited to prisoners' pro se requests for certificates of probable cause filed within the Rule 4(a) time limits.

McMillan was decided prior to Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) and this court's interpretation of that holding in Minority Employees v. Tennessee Dep't of Employment Sec., 901 F.2d 1327 (6th Cir. 1990) (en banc), cert. denied sub nom. Davis v. Tennessee Dep't of Employment Sec., No. 90-169, slip op. (U.S. Oct. 1, 1990). Torres interpreted Federal Rule of Appellate Procedure 3(c) which requires that a "notice of appeal shall specify the party or parties taking the appeal . . . and shall name the court to which the appeal is taken," to preclude jurisdiction over plaintiffs who were indicated only through the words "et al." in the notice of appeal caption. Minority Employees strictly construed Torres, finding a failure specifically to name parties

appealing to be more than an excusable informality. 901 F.2d at 1334. In this case, defendant does not name this court, as the rule requires, as the one to which he takes an appeal.

Without deciding that we have no jurisdiction, and it is certainly doubtful,[2] we conclude that Wieland cannot prevail on the merits of his claim.

2. Double jeopardy

The Fifth Amendment provides in part that "[n]o person shall . . . be subject for the same offense to be twice put in

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[2] McMillan notes that the document taken instead of a notice of appeal must "meet the requirements of Rule 3(c)," which rule requires naming the court as noted above. 823 F.2d at 983.

jeopardy of life or limb." The guaranty against double jeopardy applies against states by way of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). It is designed to

> protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense .... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

Wieland argues that the overlapping time periods in amended counts III and IV placed him twice in jeopardy for the same

offense. Double jeopardy cases typically involve attempted second prosecutions after the defendant has been acquitted, or convictions of both a substantive crime and the lesser included offense. On the other hand, it is clear that a prosecution is not unconstitutional merely because it has several counts which may involve an overlap. The overlap in dates between counts III and IV appears to give the jury an opportunity to convict twice for a crime committed on or before September 16.[3] Nonetheless, the record demonstrates that the jury understood that count III was a general count covering activity over a

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[3] We have no problem with a convition for an offense charged to have been committed "on or about September 16," if the evidence supports a reasonable basis that it occurred in the early morning hours of September 17.

period of time during which Debbi Hockman was allegedly babysitting and distinguished that from count IV which alleged a specific instance of conduct tied to a particular date. The proper course would have been to amend count III to formally omit September 16 (and September 17) as did the jury for all practical purposes, and as the prosecutor offered to do twice.

In North Carolina v. Pearch, 395 U.S. 711 (1969), the Supreme Court interpreted the Fifth Amendment to protect

> against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Id. at 717 (citations omitted). "In sum, the double jeopardy clause prohibits both successive prosecutions and multiple

punishments for the 'same offense'" Thomas, Rico Prosecutions and the Double Jeopardy/Multiple Punishment Problem, 78 Nw.U.L. Rev. 1359, 1360 (1984). Wieland claims that he has been twice prosecuted for the "same offense" and has suffered double jeopardy. He also claims to have suffered under the "multiplicity" doctrine which is related to double jeopardy multiple punishment analysis. The multiplicity claim appears most relevant here.

Multiplicity is the charging of a single offense in several counts or in several charging instruments. The danger of a multiplicitous indictment is that it may violate double jeopardy by resulting in multiple sentences or punishments for a single offense, Unitd States v. Hearod, 499 F.2d 1003, 1005 (5th Cir. 1974), or

that it may prejudice the defendants by causing the jury to convict on a given count solely on the strength of evidence on the counts remaining. Id.

A multiplicitous indictment need not necessarily be set aside. United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988) (dictum). Such an indictment may be cured through election or dismissal of counts. See e.g. United States v. Feldhacker, 849 F.2d 293, 298 (8th Cir. 1988), cert. denied sub nom. Sink v. United States, 488 U.S. 1012 (1989) (election of counts curing multiplicitous indictment). Even after trial a multiplicitous indictment need not necessarily be dismissed, especially if there was no increased sentence or if duplicative convictions can be vacated.

See United States v. Wilson, 721 F.2d 967, 971 (4th Cir. 1983) (mere inclusion of two multiplicitous counts did not warrant new trial; remand for resentencing on one count instead of both); United States v. Kimberlin, 781 F.2d 1247, 1254 (7th Cir. 1985) (remedy for multiple punishments resulting from multiplicitous indictment is to vacate three of four convictions), cert. denied, 479 U.S. 938 (1986); United States v. Brown, 688 F.2d 1112, 1121 (7th Cir. 1982) (danger of multiplicitous indictment, multiple punishment, can be remedied at any time by allowing only a single punishment); United States v. Peacock, 761 F.2d 1313, 1319-20 (9th Cir.) (remedy for conviction on multiplicitous indictment is to vacate or reverse multiplicitous count rather than

to require new trial), cert. denied, 474 U.S. 847 (1985); United States v. Davis, 799 F.2d 1490, 1494 (11th Cir. 1968) (per curiam) (remedy for duplicative sentence resulting from multiplicitous indictment is to vacate duplicative conviction). This authority demonstrates that the danger of multiple punishment in a multiplicitous indictment or information may constitutionally be remedied at any stage. In our view, Wieland was not exposed to multiple punishment under the circumstances since he was only convicted for a single specific offense on or about September 16. See United States v. Lewis, 716 F.2d 16, 23 (D.C. Cir.), cert. denied sub nom., Motlagh v. United States, 464 U.S. 996 (1983).

Furthermore, any possible prejudice that arose from the overlap in the

information against Wieland was cured through the interchange between the court and jury. We are convinced, as were the Michigan courts, that Wieland received due process of law and that his trial was essentially fair, even in the face of the overlap in time of the indictment counts III and IV. The jury fully understood any possible ambiguity in the indictment and, as a practical matter, eliminated it to find defendant guilty beyond a reasonable doubt on or about September 16 and on no other day. See United States v. Sherman, 821 F.2d 1337, 1339-40 (9th Cir. 1987). In effect, it may well be said that the trial court directed the jury to find not guilty on count III when the jury explained its dilemma.

Wieland relies on United States v. Marzani, 71 F. Supp. 615 (D.C. 1947);

aff'd, 168 F.2d 133 (D.C. Cir. 1948); aff'd, 335 U.S. 895 (1948), to make his case. Marzani stated that "[t]he test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict." 71 F. Supp. at 618. No authority is cited for this proposition. Despite Marzani, we believe, along with the Michigan courts that the dialogue between the court and jury makes it clear that the jur found Wieland guilty of criminal sexual conduct on or about September 16 only. On this basis we decline to find any constitutional violation.

The decision of the district court is accordingly AFFIRMED.